Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term 1997

JOSEPH HARMON and MARILYN HARMON,

Petitioner,

v.

OKI SYSTEMS and CROWN EQUIPMENT CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. **Where a removal petition pursuant to 28 U.S.C. § 1332(a) is totally absent of the allegation or facts regarding the amount in controversy at the time of removal, can a district court rely upon post removal information to justify federal diversity jurisdiction?**

II. **Is the amount in controversy pursuant to 28 U.S.C. § 1332(a) jurisdictional and not waivable pursuant to 28 U.S.C. § 1447(c)?**

LIST OF PARTIES

Joseph and Marilyn Harmon, Petitioners. OKI Systems and Crown Equipment Corporation, Respondents.

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OKI SYSTEMS and CROWN EQUIPMENT CORPORATION,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Petitioners, Joseph and Marilyn Harmon, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals appears at 115 F. 3d 477 (7th Cir. 1997) and is reproduced in the Appendix filed herewith ("App.") at 1a. The district court opinion regarding the issue of remand in this case appears at 902 F. Supp. 176 (S.D. Ind. 1995) and is reproduced at 11a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on June 2, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent provision of Title 28 -- Judiciary and Judicial Procedure -- § 1332. Diversity of citizenship; amount in controversy; costs is set forth below:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between --

(1) Citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

Also, the pertinent provision of Title 28 -- Judiciary and Judicial Procedure -- § 1447. Procedure after removal generally, is set forth below:

(c) A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

STATEMENT OF THE CASE

On July 29, 1991, Mr. Harmon was injured while operating a Crown Equipment Corp., Inc. (hereinafter "Crown") stand up forklift. As a result of his injuries, the Harmons filed an action in the Johnson County Superior Court No., State of Indiana alleging Crown was responsible for his injuries due to the negligentdesign of the forklift. The Harmons also included an allegation against Defendant OKI Systems, Inc. (hereinafter "OKI") for negligent maintenance.

Crown removed the case to federal court on August 20, 1993 (App. B, 11a). During discovery, the Harmons learned the removal petition filed by Crown had numerous defects, one of which was "no explicit allegation that the amount in controversy exceeded $50,000 exclusive of interest and costs" (App. B, 11a) as required by 28 U.S.C. § 1332(a). Accordingly, the Harmons requested remand of the case based upon lack

of subject matter jurisdiction at the time of removal. During the remand hearing, Crown admitted to the district court that as far as the jurisdictional amount for § 1332(a), it did not have that information at the time it attempted its removal.

After the remand hearing, Crown moved the district court to amend its removal petition based upon 28 U.S.C. § 1653. In doing so, Crown submitted post removal information for the court's consideration. The Harmons objected to the information because said information was not in the record at the time the removal petition was filed. The district court stated that "such evidence need not be submitted as part of the removal papers" (App. B, 16a). The district court allowed Crown to amend its removal petition after oral argument to insert the amount in controversy requirement even though Crown had no facts to support the amount in controversy requirement at the time the removal petition was filed.

The district court agreed with the Harmons that the "jurisdictional controversy in this case was caused by a defendant's removal [sic] papers that omitted elementary allegations" (App. B, 17a). Further, the district court stated the Tenth Circuit opinion of *Laughlin v. Kmart Corporation, 50 F. 3d 871, (10th Cir. 1995) certiorari denied, 116 S. Ct. 174* "squarely supports" the Harmons' position (App. B, 15a). However, the district court stated it could not follow Laughlin since it expressly disagreed with the Seventh Circuit decision of *Shaw v. Dow Brands, 944 F. 2d 364, (7th Cir. 1993)* (App. B, 16a). Secondly, the district court maintained the total absence of the amount in controversy requirement was procedural rather than jurisdictional, and thus, the

Harmons waived remand pursuant to 28 U.S.C. § 1447(c). Thirdly, the district court allowed Crown to use information not in the record at the time of removal to defend against the Harmons remand petition.

On October 10, 1995, the district court denied the Harmons' motion to remand and entered summary judgment for Crown on October 10, 1995. The district court also entered summary judgment for OKI on August 13, 1996.1

On appeal, the United States Court of Appeals for the Seventh Circuit affirmed that the district court denial of not error in denying the motion to remand. The appellate court maintained that a district court should not be barred from considering evidence not in the record at the time of removal to determine if federal subject matter jurisdiction existed. It held that "the test should simply be whether the evidence sheds light on the situation which existed when the case was removed" (App. A, 7a). The Seventh Circuit never attempted to reconcile its difference with the opinion of *Laughlin or Chase v. Shop 'N Save Warehouse Foods, Inc., 110 F. 3d 424, 428 (7th Cir. 1997)* (App. A, 6a).

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1 The Petitioners are not seeking review by this Court of the summary judgment rulings for Crown and OKI because the district court lacked subject matter jurisdiction to enter such orders.

REASONS FOR GRANTING THE WRIT

This case will impact every federal case wherein jurisdiction is based upon diversity pursuant to 28 U.S.C. § 1332(a).

This Court should grant the writ in order to resolve a split between the federal circuit courts of appeals on the issue of whether the amount in controversy for purposes of diversity jurisdiction must be affirmatively plead and supported by the removing party at the time of removal.

The Tenth Circuit held that the failure to allege the amount in controversy was a jurisdictional defect that could not be waived or conferred. *Laughlin* 50 F. 3d at 873.

***Laughlin* is very similar to this case. There, an employee brought an action in state court against his former employer alleging breach of an employment contract and wrongful termination. The employer removed the action to federal court. The employer's notice did not refer to an amount in controversy although the Plaintiffs' complaint was attached as an exhibit. The Plaintiff neither objected to removal or questioned the amount in controversy. The federal court granted summary judgment in favor of the employer, and the Plaintiff appealed. At the time of the appellate proceedings, the appellate court raised the issue of the existence of diversity jurisdiction and found the same to be lacking. Accordingly, the appellate court reversed the trial court with instructions to vacate its judgment and remand the action to state court. 50 F. 3d at 874.**

In doing so, the Tenth Circuit held the amount in controversy constitutes subject matter jurisdiction and cannot be waived. Subject matter jurisdiction cannot be conferred or waived by consent, estoppel, or failure to challenge jurisdiction early in the proceedings. 50 F. 3d at 873. Moreover, if the parties fail to raise the question of the existence of jurisdiction, the federal court has the duty to raise and resolve the matter. 50 F. 3d at 873. "'[T]he rule ... is inflexible and without exception, which requires [a] court, of its own motion, to deny its jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record.' " 50 F. 3d at 873 citing *Compagnie des Bauxites*, 456 U.S. at 702, 102 S. Ct. at 2104 (quoting *Mansfield, C. & L.M.R. Co. v. Swan, 111 U.S. 379, 382, 4 S. Ct. 510, 511, 28 L. Ed. 462 (1984)*).

However, the Seventh Circuit has created an entirely different rule in this case. The Seventh Circuit maintains it is not necessary for the amount incontroversy to be affirmatively plead or proven by facts in the record at the time of removal. "The test should simply be whether the evidence sheds light on the situation which existed when the case was removed" (App. A, 7a).

Within the Seventh Circuit itself, there is a split of authority. In *Chase*, a different panel held that the "court, however, is limited to examining only that evidence of the amount in controversy that was available at the moment the petition for removal was filed" (App. A, 5a). 110 F. 3d at 428.

The district court denied the Harmons' remand petition partly upon the Seventh Circuit case of *Shaw v.*

Dow Brands, 944 F. 2d 364, (7th Cir. 1993) (App. B, 16a). In *Shaw*, the Seventh Circuit maintained the amount in controversy can be waived.

Shaw has been questioned by several federal courts. See, *Laughlin* 50 F. 3d at 873-4; *United Food & Commercial Workers Union v. Centermark Properties Meriden Square, Inc., 30 F. 3d 298, 303-4 (2nd Cir. 1994)*; *Prizevoits v. Indiana Bell Telephone Co., 76 F. 3d 132, 134 (7th Cir. 1996).* Also, see *Heichman v. American Telephone and Telegraph Company, 943 F. Supp. 1212, 1221, fn. 1 (C.D. Cal. 1995).*

Without a definitive rule or at least more specific guidance, the lower courts will use a hodgepodge of conflicting rules and theories to reach contradictory conclusions as to whether the amount in controversy must be affirmatively plead and proven by facts in the record at the time of removal. The decision by the Unites States Court of Appeals for the Seventh Circuit in this case demonstrates the danger of continued uncertainty regarding federal subject matter jurisdiction at the time of removal.

Not only is there a split among federal courts, the decision of the Seventh Circuit is contrary to United States Supreme Court precedence that the amount in controversy is determined on the basis of the record at the time the petition for removal is filed. *St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 291-293 (1938).*

Thirdly, the decision of the Seventh Circuit is contradictory to preservation of state and federal comity. Federal courts are courts of limited jurisdiction_whose

power is limited strictly by Article III of the Constitution and congressional statute. *Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541, 106 S. Ct. 1326, 1331 (1986).* Federal courts are required to resolve all doubts about federal jurisdiction in favor of remand. *Steel Valley Auth. v. Union Switch & Signal Div., 809 F. 2d 1006, 1010 (3d Cir.1987), cert. denied, 484 U.S. 1021, 108 S. Ct. 739.* There is a general judicial rule that removal statutes are to be strictly construed against removal. *Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, (1941).*

I. WHERE A REMOVAL PETITION PURSUANT TO 28 U.S.C. § 1332(a) IS TOTALLY ABSENT OF THE ALLEGATION OR FACTS REGARDING THE AMOUNT IN CONTROVERSY AT THE TIME OF REMOVAL, A DISTRICT COURT CANNOT RELY UPON POST REMOVAL INFORMATION TO JUSTIFY FEDERAL DIVERSITY JURISDICTION.

The Seventh Circuit's opinion in this case expands federal jurisdiction beyond the United States Constitution and established Supreme Court precedence. The amount in controversy is a jurisdictional requirement which must exist by facts in the record at the time of removal. Established case law requires that subject matter jurisdiction must exist at the time of removal. *St. Paul Mercury Indemnity Co.*, 303 U.S. at 291-293. A party alleging jurisdiction must justify its allegations by a preponderance of evidence. *McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189, 56 S. Ct. 780, 785 (1936).*

Crown's removal petition had no explicit allegation that the amount in controversy exceeded $50,000 exclusive of interests and costs (App. B, 11a-12a). ". . . The amount in controversy is determined on the basis of the record existing at the time the petition for removal is filed." 14 A Wright, Miller and Cooper, Federal Practice and Procedure: Jurisdiction 2d §3725, pg. 417 (1985); *St. Paul Mercury Indemnity Co.*, 303 U.S. at 291-293.

The opinion of the Seventh Circuit violates every Supreme Court and federal precedent that requires the amount in controversy must be alleged and proven at the time the removal petition is filed. The Seventh Circuit's opinion violates state and federal comity.

The recent opinion of *Caterpillar, Inc. v. Lewis, 117 S. Ct. 467 (1996)* is not controlling here. In *Caterpillar*, the question was whether complete diversity existed between two parties. *Caterpillar* did not involve a total absence of the allegation or facts regarding the amount in controversy at the time of removal. However, the Court should consider the prediction noted in *Caterpillar* that defendants will prematurely remove cases to federal court in hopes that some subsequent developments will permit the case to remain in federal court. 117 S. Ct. at 477. This prediction has come true in this case. This case underscores the need of this Court to carefully guard the door through which federal diversity jurisdiction is granted. Absent such vigilance, the flood gates of removal petitions will swamp the federal judiciary.

II. THE AMOUNT IN CONTROVERSY PURSUANT TO 28 U.S.C. § 1332(a) IS JURISDICTIONAL AND NOT WAIVABLE PURSUANT TO 28 U.S.C. § 1447(c).

The amount in controversy is a subject matter jurisdictional requirement for federal jurisdiction and the absence of the requirement is not waivable pursuant to 28 U.S.C. § 1447(c).2 The district court maintained that the absence of the allegation and facts to support the amount in controversy at the time of removal was a procedural defect, and thus waived by the Harmons since the Harmons did not object to the removal within 30 days. The Seventh Circuit did not directly or indirectly address this specific finding. So unique was the district court's holding that opinion, not one case was cited from any federal authority to support the idea that the amount in controversy is a procedural defect which can be waived.

To the contrary, federal authority supports the Harmons' position that the amount in controversy is jurisdictional and not procedural. The amount in controversy is considered jurisdictional. "[A]

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2 There is no difference between the pre and post 1988 amendments to 28 U.S.C. § 1447(c) regarding lack of subject matter jurisdiction. The 1988 amendment in no way changed the long standing rule that subject matter jurisdiction can never be waived. The 1988 amendment only addressed procedural errors in the removal process. *Page v. City of Southfield*, 45 F. 3d 128, 132 (6th Cir. 1995).

jurisdictional amount requirement goes to subject matter jurisdiction and lack of it cannot be waived . . ." ***Baris v. Sulpicio Lines, Inc., 932 F. 2d 1540, 1552, n.6, (5th Cir. 1991).***

The district court maintained since the Harmons did not file their motion to remand within 30 days, they waived subject matter jurisdiction pursuant to 28 U.S.C. §1447(c). The district court confused subject matter jurisdiction with procedural defects in the removal petition.

Any defect in removal procedure includes all non-jurisdictional defects existing at the time of removal. ***In re: Allstate Ins. Co., 8 F. 3d 219, (5th Cir. 1993).*** **A procedural defect is any defect that does not go to the question of whether the case originally could have been brought into federal court.** ***Baris*****, 932 F. 2d at 1544.** ***In*** **construing 28 U.S.C. Sec. 1447(a), (procedural defect the Baris opinion defined any defect in the removal procedure as all non-jurisdictional defects existing at the time of removal.** ***Baris*****, 932 F. 2d at 1545-6. In applying the** ***Baris*** **logic, this case could not have been brought into federal court at the time of removal based upon Crown's removal petition that was totally absent of any allegation or facts to establish the amount in controversy exceeded $50,000 exclusive of interest and costs.**

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully Submitted,

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In the

United States Court of Appeals

For the Seventh Circuit

No. 96-3287

JOSEPH HARMON and MARILYN HARMON,

Plaintiffs-Appellants,

v.

OKI SYSTEMS and CROWN EQUIPMENT CORPORATION,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division.
No. 93 C 1102--David F. Hamilton, Judge.

Argued April 14, 1997--Decided June 2, 1997

Before FLAUM, EASTERBROOK, and EVANS, Circuit Judges.

EVANS, Circuit Judge. This is a products liability case stemming from injuries Joe Harmon suffered when his

foot was pinned between a wall and a forklift he had been driving. After Harmon and his wife sued the manufacturer and the company that serviced the forklift in Indiana state court, the manufacturer removed the case to the United States District Court for the Southern District of Indiana. After nearly 2 years of discovery the Harmons filed a motion to remand. Judge David Hamilton denied the motion and granted summary judgment for the defendants. This appeal followed.

Harmon had driven forklifts at the Cummins Engine Plant in Indianapolis, Indiana, for over 19 years. On the morning of July 29, 1991, he was operating a "Rider," an electric-powered "stand-up" forklift manufactured by Crown Equipment. Harmon used the Rider for 6 hours before lunch, took a break, and resumed operations in the afternoon. Throughout the day, the brakes on the Rider, which operate just the opposite as do brakes on a car (i.e., you have to press down on the pedal to disengage the brakes), worked properly. Shortly after resuming work, Harmon jumped off of the Rider to retrieve a box. As he was about to pick up the box, he saw the Rider coming toward him. Harmon tried to jump back onto the forklift, but his foot became pinned between the Rider and a concrete wall. He was unable to free himself and called for help. Although a number of co-workers came to his aid,they were unable to move the Rider until Harmon stepped on the brake pedal with his other foot and drove away from the wall.

In July 1993 the Harmons sued Crown and OKI Systems, the company that sold and serviced the Rider, in Indiana state court. Mr. Harmon's suit alleged Crown negligently designed the Rider and was strictly liable for selling a product that was defective due to inadequate warnings.

Mr. Harmon also asserted that OKI negligently maintained the forklift. Mrs. Harmon tacked on a loss of consortium claim, and both Harmons sought punitive damages.

On August 20, 1993, Crown filed a notice of removal and civil cover sheet in district court, alleging diversity jurisdiction existed under 28 U.S.C. sec.1332. The notice stated Crown and OKI were Ohio corporations and the Harmons were Indiana residents. However, the notice, which was no model to emulate, did not mention (1) the defendants' principal places of business; (2) the Harmons' Indiana citizenship (as opposed to their residence); or (3) that over $50,000 was at stake.

The Harmons did not immediately point out the omissions. Instead they engaged in discovery for almost two years. On August 9, 1995, however, after the district court dropped the case from the trial calendar and scheduled arguments on the defendants' motions for summary judgment--a subtle hint that the case might end in defeat without a trial--the Harmons suddenly "discovered" the omissions in the removal notice and sought remand back to state court.

Judge Hamilton denied the remand request and allowed Crown to amend its removal papers pursuant to 28 U.S.C. sec.1653. He pointed out that the Harmons did not claim that diversity did not exist or that the amount in controversy was less than $50,000. Rather, the Harmons merely asserted that Crown failed to demonstrate those facts to a reasonable probability. Judge Hamilton then found that the omissions at issue were "procedural defects" and explained that under 28 U.S.C. sec.1447(c), a motion to remand based on defects of this sort must be

made within 30 days of removal. Finally, Judge Hamilton concluded that the record amply demonstrated that federal jurisdiction was proper at the time of removal. He noted that the Harmons' answers to interrogatories made clear that they had incurred over $55,000 in medical expenses alone and that $80,000 in lost wages were suffered by the time the case was removed.

On the same day he denied remand, Judge Hamilton resolved a number of evidentiary issues and granted summary judgment for Crown. He concluded the Harmons had not shown that any act or omission by Crown proximately caused the accident. Approximately 10 months later and based on a slightly different record, Judge Hamilton granted summary judgment for OKI. He again reasoned that the Harmons could not show proximate cause. We review the district court's conclusion that it had jurisdiction and its decisions to grant summary judgment, de novo.

The Harmons first argue that Judge Hamilton erred by declining to remand the case and allowing Crown to amend its removal papers. The plaintiffs raise a bunch of arguments, all of which can be boiled down to two main themes. First, they contend the district court erred in finding that the omissions in Crown's notice were subject to sec.1447's 30-day limit for challenging procedural defects. Second, they contend the district court erred by using postremoval evidence (i.e., answers to interrogatories) to determine whether jurisdiction was proper at the time of removal. Throughout both arguments the Harmons remind us that Crown admitted (at a hearing on the issue) it did not know the exact amount in controversy when the case started because

Indiana rules bar plaintiffs from alleging a specific damage figure in their complaints.

Our first task is to pin down whether Crown's errors were procedural defects covered by sec.1447(c) or instead omissions which reveal the absence of subject matter jurisdiction. See In re Continental Cas. Co., 29 F.3d 292, 293 (7th Cir. 1994). The only circuit to consider this issue has found that sec.1447(c) covers any defects which do not go to the "question of whether the case could have been brought in federal district court." In re Allstate Ins. Co., 8 F.3d 219, 221 (5th Cir. 1993). Applying that definition, the Fifth Circuit held that a defendant's failure to allege citizenship as opposed to residency (one of Crown's errors) constituted a procedural defect. As the court put it, although the party failed "to demonstrate diversity, the record discloses no dispute that it in fact existed." Id. (emphasis in original). That seems logical, and Crown's omissions--like those in Allstate--did not undermine jurisdiction (as would have been the case, for example, if the Harmons were really Ohio citizens living in Indiana).

The question is, then, what evidence may the district court use to figure out whether jurisdiction actually existed at the time of removal. The Harmons say district courts are limited to the evidence in the record when removal is sought. In support, they cite In re Shell Oil Co., 970 F.2d 355 (7th Cir. 1992) (per curiam), which held that plaintiffs cannot defeat federal jurisdiction simply by filing postremoval affidavits stating they are seeking less than the jurisdictional amount. In addition, our recent opinion in Chase v. Shop 'N Save Warehouse Foods, Inc., No. 96-2037, 1997 WL 149536 (7th Cir. Mar. 27, 1997), seems to lend some support to the Harmons' view. It

states, the "court, however, is limited to examining only that evidence of the amount in controversy that was available at the moment the petition for removal was filed." Id. at *3 (citing Shell). Finally, the plaintiffs refer us to Laughlin v. Kmart Corp., 50 F.3d 871 (10th Cir.), cert. denied, 116 S. Ct. 174 (1995). In that case the defendant removed a suit based on diversity jurisdiction, but did not mention the amount in controversy. Although the plaintiff never objected, the Tenth Circuit raised the jurisdictional issue sua sponte and ordered remand even though the defendant's jurisdictional brief made clear that the amount in controversy was "well above" $50,000. Id. at 873.

It would not be prudent to strictly limit a district court as the Harmons suggest. First, neither Shell nor Chase dealt with an attempt to amend defective allegations of jurisdiction under sec.1653. Rather, in both cases, plaintiffs attempted to change the facts upon which jurisdiction was based. For example, in Shell the plaintiff tried to pull the rug out from under the district court by filing a postremoval stipulation that he would not seek to recover more than the jurisdictional amount. 970 F.2d at 356. The attempt to manipulate jurisdiction was even more transparent in Chase. In that case the plaintiff sued in state court, and the defendant removed. 1997 WL 149536 at *1. After her motion to remand was denied, the plaintiff voluntarily withdrew the suit. Two years later she refiled her complaint in state court, and the defendant once again removed the suit to federal court. The plaintiff moved to remand and, while her motion was pending, sought leave to amend her complaint to seek damages in an amount no greater than $49,999.99. We concluded that the district court correctly determined that federal jurisdiction was proper at the time of removal. Id. at *3.

Second, should a court really be barred from considering reliable evidence (which has been gathered during nearly 2 years of discovery) merely because the evidence was not in the record on the date of removal? The test should simply be whether the evidence sheds light on the situation which existed when the case was removed. Finally, although it appears the Harmons were trying to forum shop--they pulled the rip cord when the district court scheduled arguments on the summary judgment motions--what did they hope to accomplish? Any court would, we think, reach the same result reached by Judge Hamilton, whose opinion on the merits, for the reasons that follow, is unassailable.

The Harmons claim the district court impermissibly weighed the evidence and disregarded a dispute over whether the Rider was stopped when Harmon dismounted. They also claim the district court erred by failing to realize that proximate cause is always a jury question. Finally, they assert that an affidavit submitted by their expert, Jack Winsor, created a dispute over whether proximate cause had been shown.

Judge Hamilton properly concluded that any dispute over whether the Rider was still moving at the time of the accident was immaterial. If the Rider was stopped--as the evidence outlined in the judge's opinion seems to indicate--the Harmons cannot get past summary judgment unless they point to some evidence either that a defect caused it to spontaneously move or that a warning could have prevented the injury. They haven't done so. The brakes were working properly all morning and again after the incident. (Harmon had to disengage them, you recall, to drive away from the wall).

If, on the other hand, the forklift was still moving, no warning would have prevented the accident. The Harmons claim Crown should have warned them that a moving Rider can travel up to 8 feet after the brakes are engaged. However, Harmon admitted that he had been warned and knew not to jump off a moving forklift. He had used forklifts for 19 years and had to realize that a 7000 lb. vehicle would travel a short distance after the brakes were applied.

Finally, Winsor's affidavit does not get the Harmons over the hump. The Harmons rely on a single sentence, which opines that "failure to incorporate an adequate warning device and have adequate warnings on the rider . . . was a proximate cause of injury to Mr. Harmon." Without any evidence in the record to support that (legal) conclusion, Winsor's statement simply is not enough to get the Harmons' claims against Crown to the jury. See Buckner v. Sam's Club, Inc., 75 F.3d 290 (7th Cir. 1996) (summary judgment appropriate where, despite an expert's opinion to the contrary, the undisputed facts would not allow a reasonable jury to infer proximate cause).

The Harmons also allege OKI negligently maintained the Rider. They point out that OKI serviced the forklift monthly from November 1988 to December 1990 but not during the 6 months before the accident. The Harmons contend summary judgment was inappropriate against OKI because: (1) OKI's motion failed to contain a statement of undisputed facts as required by local rules; and (2) Judge Hamilton improperly struck Winsor's statement that the Rider had been used for 338 hours without being serviced and that service should be performed every 100 hours.

The lack of proximate cause is even more glaring in OKI's case. OKI submitted, in admissible form, the results of a postaccident inspection of the Rider's brakes. Everything checked out just fine. If the evidence was undisputed that the brakes worked properly both before and after the accident, how can the Harmons prevail on a negligent maintenance claim? Additionally, it was not an abuse of discretion for the judge to strike the expert's statement that the Rider had not been serviced for 338 hours. The assertion was based on an OKI employee's statement that OKI had not serviced the Rider--there was no evidence to suggest that Cummins had not checked over the forklift. (Although Judge Hamilton excluded the statement as hearsay, one of OKI's employees stated that Cummins agreed to take over maintenance of the Rider in December 1990). However, even if the affidavit were correct, it is meaningless in the absence of some evidence that the failure to perform maintenance led to worn or defective brakes. The Harmons have no such evidence.

Finally, Judge Hamilton rejected the Harmons' claim that the Southern District's local rule 56.1 knocked out OKI's brief in support of its summary judgment motion. The decision to keep the brief in the case was not an abuse of discretion. See Little v. Cox's Supermarkets, 71 F.3d 637, 640 (7th Cir. 1995) ("[I]t is clear that the decision whether to apply the rule strictly or to overlook any transgression is one left to the district court's discretion."). Rule 56.1 requires, among other things, a statement of undisputed material facts, and it's true that OKI didn't include one. However, the rule is designed to let the court and the opposing party know what legal and factual issues are on the table. Neither the court nor the Harmons could have been confused. OKI's brief was only 3 pages long, and the few assertions of fact in it were

found in a 3-page affidavit and a 14-page excerpt from a deposition. There was certainly no prejudice from this technical failure.

AFFIRMED.

Joseph HARMON and Marilyn Harmon, Plaintiffs,
v.
OKI SYSTEMS and Crown Equipment Corporation,
Defendants.

No. IP 93-1102-C.
United States District Court,
S.D. Indiana,
Indianapolis Division.

Oct. 10, 1995.

ENTRY ON PLAINTIFFS' MOTION TO REMAND

HAMILTON, District Judge.

Plaintiff Joseph Harmon was injured in an accident on the job on July 29, 1991. His left foot was pinned between a concrete wall and a forklift he had been driving. The forklift was manufactured by defendant Crown Equipment Corporation (Crown) and sold and maintained by defendant OKI Systems. Joseph Harmon and his wife Marilyn Harmon originally filed this product liability action in the Johnson Superior Court on July 28, 1993. On August 20, 1993, defendant Crown removed the case, asserting that this court has diversity jurisdiction under 28 U.S.C. § 1332. Nearly two years later, on August 9, 1995, plaintiffs filed their motion to remand.

Plaintiffs point out correctly that Crown's removal petition has three defects. First, the removal petition makes no explicit allegation that the amount in controversy exceeds $50,000 exclusive of interest and costs. Second, the removal petition says nothing about the corporate defendants' principal places of business, an

essential element of corporate citizenship for diversity purposes. Third, the removal petition says nothing about the plaintiffs' citizenship, as opposed to their residence. Although these elementary defects in Crown's removal papers would have required remand if plaintiffs' motion had been filed promptly, by waiting more than thirty days after the removal, plaintiffs waived these defects, and their motion to remand must therefore be denied.

Section 1447(c) of Title 28 of the United States Code provides in relevant part: "A motion to remand the case on the basis of any defect in removal procedure must be made wi n 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." Because plaintiffs did not file their motion to remand within thirty days, the issue in terms of § 1447(c) is whether the defects in the removal petition are merely waivable "defects in the removal procedure" or instead undermine the court's jurisdiction over the subject matter. See *In re Continental Casualty Co.*, 29 F.3d 292, 293-95 (7th Cir.1994) (§ 1447(c) sets up these two categories of reasons for remand; parties may waive timeliness requirement).

Neither side has cited any decisions of the Seventh Circuit that would aid in classifying the specific defects in Crown's notice as either waivable procedural defects or fatal jurisdictional flaws. Crown relies on *In re Allstate Ins. Co.*, 8 F.3d 219 (5th Cir.1993), in which the Fifth Circuit granted a writ of mandamus to overturn a district court's immediate and *sua sponte* remand of a case in which the removal petition failed to allege the plaintiff's citizenship. Following its decision in *Baris v. Sulpicio*

Lines, 932 F.2d 1540, 1544 (5th Cir.1991), the Fifth Circuit said that a procedural defect under § 1447(c) refers to "any defect that does not go to the question of whether the case originally could have been brought in federal district court...." 8 F.3d at 221. "By this standard, Allstate's failure to allege, in its notice of removal, the plaintiff's citizenship at the time the original petition was filed constitutes a procedural, rather than jurisdictional, defect; although Allstate failed conclusively to *demonstrate* diversity, the record discloses no dispute that it in fact *existed.*" *Id.* (emphasis in original).

[1] There is no credible excuse for the defects in Crown's notice of removal. However, applying to this case the difference as articulated in *Allstate* between diversity jurisdiction being demonstrated and diversity jurisdiction actually existing, the court concludes that those defects are waivable procedural defects for purposes of § 1447(c). Plaintiffs do not actually claim they are or *178 have been citizens of any state other than Indiana. They do not dispute that both defendants are and have been Ohio corporations with their principal places of business in Ohio. Crown has come forward with evidence demonstrating both points, so these elements of diversity jurisdiction, in the terms of *Allstate,* clearly existed at the time of removal even if Crown failed to allege or demonstrate them at the time of removal.

[2] [3] The argument on the jurisdictional amount in controversy is a little more involved. Plaintiffs do not actually deny that the amount in controversy was less than $50,000 at the time of removal. They contend only that the jurisdictional amount in controversy was not demonstrated to a reasonable probability at that time.

Crown supports its removal now by relying on plaintiffs' interrogatory answers showing that, by the time of removal, Joseph Harmon had already incurred medical expenses alone in excess of $55,000, as well as lost wages by that time in excess of $80,000. In addition, both plaintiffs sought punitive damages in their state court complaint.

Plaintiffs argue that Crown cannot now establish the jurisdictional amount in controversy by relying on post-removal evidence, such as their interrogatory answers. Plaintiffs cite *In re Shell Oil Co.*, 970 F.2d 355 (7th Cir.1992), and this court's recent decision in *Reason v. General Motors Corp.*, 896 F.Supp. 829 (S.D.Ind.1995), which held that plaintiffs could not defeat removal by merelyclaiming, after removal, that they were seeking less than the jurisdictional amount. What is sauce for the goose is sauce for the gander, say plaintiffs, and if a plaintiff cannot defeat removal with a later disclaimer, a defendant should not be allowed to cure defective removals with post-removal evidence.

Plaintiffs' argument misconstrues *Shell Oil* and *Reason*. Both cases held that after a case is properly removed, a plaintiff cannot defeat removal by, in essence, changing the facts with a later disclaimer saying that the jurisdictional amount is not in controversy. In *Reason*, however, the plaintiffs could still raise the issue of the amount that was actually in controversy. Raising the issue is enough to impose on the party asserting federal jurisdiction the burden of coming forward with "competent proof" to establish at least a "reasonable probability" that the jurisdictional amount in controversy requirement was satisfied at the time of removal. 896 F.Supp. at 834 (citing *NLFC, Inc. v. Devcom*

Mid-America, Inc., 45 F.3d 231, 237 (7th Cir.1995); and *Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 366-67 n. 2 (7th Cir.1993)). In fact, in *Reason* this court remanded the case, but did so without relying at all on plaintiffs' post-removal disclaimer. The court relied instead on the defendant's failure to come forward with evidence sufficient to show a reasonable probability that the amount in controversy exceeded $50,000 at the time of removal.

Plaintiffs' late motion to remand in this case was sufficient to require Crown to meet that same burden here. The issue is whether such a reasonable probability existed at the time of the removal. Nothing in *Shell Oil, Reason, NLFC,* or *Shaw* prevents the party asserting federal jurisdiction from relying on evidence generated after the removal. Of course, it would not be enough to show that the amount in controversy was greater than $50,000 after removal, but post-removal admissions by parties opposing federal jurisdiction may be considered if they are probative of the amount in controversy at the time of removal. [1]

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[1] Defendant OKI Systems filed a document designating the deposition testimony of Dr. George Launey and all exhibits as evidence of the damages claimed by both plaintiffs. Plaintiffs movedto strike this designation as untimely and irrelevant. It is untimely. Whether it is relevant is unclear because OKI Systems designated the entire transcript and all exhibits without any indication of which portions might be relevant or why. The court will not undertake its own unguided search of the deposition and exhibits for relevant information. See *Northwestern Nat. Ins. Co. v. Baltes,* 15 F.3d 660, 662 (7th Cir.1994). OKI Systems' designation is untimely and will therefore be stricken.

In this case, Crown has satisfied its burden of showing a reasonable probability that the amount in controversy at the time of removal exceeded $50,000 for each plaintiff's claim. Joseph Harmon's medical expenses incurred and lost wages accrued by the time of removal *179 each exceeded the amount in controversy requirement. He also sought compensatory damages for pain and suffering, as well as punitive damages. Marilyn Harmon's claim for loss of consortium is less capable of exact proof, but in view of the magnitude of Mr. Harmon's injuries, the recovery being claimed by plaintiffs and the assertion of claims for punitive damages, there was a reasonable probability at the time of removal that her claims also exceeded the jurisdictional amount in controversy. [2]

When Congress amended § 1447(c) in 1988 to allow waiver of procedural defects, the House committee report explained:

> So long as the defect in the removal procedure does not involve a lack of federal subject matter jurisdiction, there is no reason why either State or Federal courts, or the parties, should be subject to the burdens of shuttling a case between two courts

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[2] The court therefore need not answer in this case the question raised but not answered in *Reason:* whether supplemental jurisdiction in a diversity case can include the separate and distinct claim of a plaintiff who cannot satisfy the jurisdictional amount in controversy on his or her own. See 896 F.Supp. at 835, at n. 4 (noting conflict in district court decisions).

> that each have subject matter jurisdiction. There is some risk that a party who is aware of a defect in removal procedure may hold the defect in reserve as a means for forum shopping if the litigation should take an unfavorable turn.

H.R.Rep. No. 889, 100th Cong., 2d Sess. 72 (1988), *reprinted in* 1988 U.S.Code Cong. &Ad.News 5982, 6033. These concerns are relevant here. The defects in the original removal petition should have been evident for nearly two years before the remand motion was filed. Yet the motion was filed only a few days after the court vacated the trial setting and scheduled oral argument on Crown's motion for summary judgment. After the 1988 amendment to § 1447(c), mere defects in allegations no longer give a party who later senses trouble in federal court a kind of emergency ejection device to escape the forum.

Nevertheless, in support of their motion to remand, plaintiffs rely on the Tenth Circuit's decision in *Laughlin v. Kmart Corp.*, 50 F.3d 871 (10th Cir.1995), which squarely supports their position. In *Laughlin*, the plaintiff's original state court pleading alleged damages for each of two claims "in excess of $10,000." The defendant removed but, like Crown here, its removal notice did not refer to an amount in controversy. The plaintiff did not object to removal. The question of jurisdiction was not raised until the Tenth Circuit raised and decided it on appeal. The defendant apparently set forth facts in its appellate brief alleging that the amount in controversy was satisfied at the time of the removal. Although the court did not address § 1447(c), it implicitly treated the failure to include any allegation of a jurisdictional amount in the removal petition as a

jurisdictional defect that could not be waived or corrected. 50 F.3d at 873.

This court cannot follow *Laughlin* for two reasons. First, in *Laughlin* the Tenth Circuit expressly disagreed with the Seventh Circuit's decision in *Shaw v. Dow Brands*, 994 F.2d at 366-68. This court is in the Seventh Circuit and must follow controlling Seventh Circuit decisions. *Shaw* instructed that where a plaintiff does not raise a challenge to the jurisdictional amount in controversy, but the court raises the issue itself, the court should require the removing defendant to come forward with evidence to show the required amount is actually in controversy. 994 F.2d at 366 n. 2. The Seventh Circuit therefore rejected the *Laughlin* approach of immediate and *sua sponte* remand. In this case, plaintiffs have raised the issue, but the *Shaw* approach of giving the party seeking a federal forum the opportunity to come forward with evidence to support jurisdiction applies here, and this court must follow Seventh Circuit law. Second, the Tenth Circuit in *Laughlin* never discussed the possible application of 28 U.S.C. § 1447(c) and the plaintiff's apparent waiver of any defects in removal procedure. This court agrees with the *Laughlin* court in that the basis for the court's jurisdiction must appear in the record, but § 1447(c) should permit the party asserting federal jurisdiction *180. to make that proof at any time prior to judgment if no challenge is raised earlier. [3]

[3] After argument on the motion to remand, Crown filed a motion to amend its defective removal papers pursuant to 28 U.S.C. § 1653, which authorizes amendment of "defective allegations of jurisdiction." The amendment Crown seeks is incorporation of all evidence submitted by Crown and OKI Systems in opposition to remand. Such evidence need not be

CONCLUSION

The jurisdictional controversy in this case was caused by a defendant's remand papers that omitted elementary allegations. This failure has created an avoidable and completely unnecessary cloud of uncertainty over the entire case. However, the plaintiffs waived their objections to these defects in the removal procedures. Plaintiffs' motion to remand this case to the Johnson Superior Court is DENIED.

So ordered.

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submitted as part of the removal papers. It is sufficient in this case to amend the removal petition to include the assertions that, at the time of removal: (a) the amount in controversy for each plaintiff's claim exceeded $50,000, (b) each corporate defendant had its principal place of business in Ohio, and (c) plaintiffs are both citizens of Indiana. The court grants the motion to amend to the extent that Crown's removal petition should be deemed amended to include these three allegations. See *America's Best Inns, Inc. v. Best Inns of Abilene, L.P.*, 980 F.2d 1072, 1074 (7th Cir.1992) (court willing to accept amended jurisdictional allegations even after oral argument on appeal); *Poulos v. Naas Foods, Inc.*, 959 F.2d 69, 70 n. 1 (7th Cir.1992) (same).